



[6714-01-P]

## **FEDERAL DEPOSIT INSURANCE CORPORATION**

### **12 CFR Parts 336 and 390**

#### **RIN 3064- AD98**

### **Removal of Transferred OTS Regulations Regarding Post-Employment Activities of Senior Examiners**

**AGENCY:** Federal Deposit Insurance Corporation.

**ACTION:** Notice of proposed rulemaking.

**SUMMARY:** In this notice of proposed rulemaking, the Federal Deposit Insurance Corporation (FDIC) proposes to rescind and remove from the Code of Federal Regulations 12 CFR part 390, subpart A, entitled Restrictions on Post-Employment Activities of Senior Examiners. This subpart was included in the regulations that were transferred to the FDIC from the Office of Thrift Supervision (OTS) on July 21, 2011, in connection with the implementation of applicable provisions of Title III of the Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank Act”). Upon removal of 12 CFR part 390, subpart A, the restrictions for post-employment activities of senior examiners of all insured depository institutions for which the FDIC has been designated the appropriate federal banking agency will be found at 12 CFR part 336, subpart C, entitled One-Year Restriction on Post-employment Activities of Senior Examiners. The proposed rule would not change 12 CFR part 336, subpart C.

This notice of proposed rulemaking also proposes to revise the definition section of 12 CFR part 336, subpart B.

**DATES:** Comments must be received on or before [insert date 60 days after publication in the Federal Register].

**ADDRESSES:** You may submit comments by any of the following methods:

- **FDIC Web Site:** <http://www.fdic.gov/regulations/laws/federal/propose.html>. Follow instructions for submitting comments on the agency website.

- **FDIC E-mail:** [Comments@fdic.gov](mailto:Comments@fdic.gov). Include RIN # 3064-AD84 on the subject line of the message.

- **FDIC Mail:** Robert E. Feldman, Executive Secretary, Attention: Comments, Federal Deposit Insurance Corporation, 550 17th Street, NW, Washington, DC 20429.

- **Hand Delivery to FDIC:** Comments may be hand-delivered to the guard station at the rear of the 550 17th Street Building (located on F Street) on business days between 7 a.m. and 5 p.m.

Please include your name, affiliation, address, e-mail address, and telephone number(s) in your comment. Where appropriate, comments should include a short Executive Summary consisting of no more than five single-spaced pages. All statements received, including attachments and other supporting materials, are part of the public record and are subject to public disclosure. You should submit only information that you wish to make publicly available.

**Please note:** All comments received will be posted generally without change to <http://www.fdic.gov/regulations/laws/federal/propose.html>, including any personal information provided. Paper copies of public comments may be requested from the Public Information Center by telephone at 1-877-275-3342 or 1-703-562-2200.

**FOR FURTHER INFORMATION CONTACT:**

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## **SUPPLEMENTARY INFORMATION:**

### **I. Background**

#### ***The Dodd-Frank Act***

The Dodd-Frank Act<sup>1</sup>, signed into law on July 21, 2010, provided for a substantial reorganization of the regulation of State and Federal savings associations and their holding companies. Beginning July 21, 2011, the “transfer date” established by section 311 of the Dodd-Frank Act (12 U.S.C. 5411), the powers, duties, and functions formerly performed by the OTS were divided among the FDIC; as to State savings associations, the Office of the Comptroller of the Currency (OCC); as to Federal savings associations, and the Board of Governors of the Federal Reserve System (FRB), as to savings and loan holding companies. Section 316(b) of the Dodd-Frank Act (12 U.S.C. 5414(b)) provides the manner of treatment for all orders, resolutions, determinations, regulations, and other advisory materials, that were issued, made, prescribed, or allowed to become effective by the OTS. The section provides that if such advisory materials were in effect on the day before the transfer date, they continue in effect and are enforceable by or against the appropriate successor agency until they are modified, terminated, set aside, or superseded in accordance with applicable law by such successor agency, by any court of competent jurisdiction, or by operation of law.

Section 316(c) of the Dodd-Frank Act (12 U.S.C. 5414(c)) further directed the FDIC and the OCC to consult with one another and to publish a list of the continued OTS

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<sup>1</sup> Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111-203, 12 U.S.C. 5301 *et seq.*

regulations which would be enforced by the FDIC and the OCC, respectively. On June 14, 2011, the FDIC's Board of Directors approved a "List of OTS Regulations to be Enforced by the OCC and the FDIC Pursuant to the Dodd-Frank Wall Street Reform and Consumer Protection Act." This list was published by the FDIC and the OCC as a Joint Notice in the Federal Register on July 6, 2011.<sup>2</sup>

Although section 312(b)(2)(B)(i)(II) of the Dodd-Frank Act (12 U.S.C. 5412(b)(2)(B)(i)(II)) granted the OCC rulemaking authority relating to both State and Federal savings associations, nothing in the Dodd-Frank Act affected the FDIC's existing authority to issue regulations under the FDI Act and other laws as the "appropriate Federal banking agency" or under similar statutory authority. Section 312(c) of the Dodd-Frank Act amended section 3(q) of the Federal Deposit Insurance Act (12 U.S.C. 1813(q)) and designated the FDIC as the "appropriate Federal banking agency" for State savings associations. As a result, when the FDIC acts as the designated "appropriate Federal banking agency" (or under similar authority) for State savings associations, as it does here, the FDIC is authorized to issue, modify and rescind regulations involving such associations.

As noted above, on June 14, 2011, operating pursuant to this authority, the FDIC's Board of Directors reissued and redesignated certain transferring regulations of the former OTS. These transferred OTS regulations were published as new FDIC regulations in the Federal Register on August 5, 2011.<sup>3</sup> When it republished the transferred OTS regulations as new FDIC regulations, the FDIC specifically noted that its staff would evaluate the transferred OTS rules and might later recommend incorporating the transferred OTS

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<sup>2</sup> 76 FR 39247 (July 6, 2011).

<sup>3</sup> 76 FR 47652 (August 5, 2011).

regulations into FDIC rules that existed before the transfer, or amending them, or rescinding them, as appropriate.

One of the regulations transferred to the FDIC covers OTS restrictions on the post-employment activities of its senior examiners. The OTS's regulation, formerly found at 12 CFR part 507, was transferred to the FDIC with only nominal changes and is now found in the FDIC's rules at 12 CFR part 390, subpart A. Before the transfer, the FDIC's rules included 12 CFR part 336, subpart C, a rule governing restrictions on the post-employment activities of its senior examiners. After careful review and comparison of 12 CFR part 390, subpart A—*Restrictions on Post-Employment Activities of Senior Examiners* and 12 CFR part 336, subpart C—*One-Year Restriction on Post-employment Activities of Senior Examiners*, the FDIC proposes to rescind 12 CFR, part 390, subpart A, because this subpart largely duplicates 12 CFR part 336, subpart C.

The rules found at 12 CFR, part 336, subpart C and 12 CFR part 507 were issued in 2005, as part of a joint interagency rulemaking among the FDIC, the FRB, the OCC, and the OTS. The agencies issued substantively similar rules that implemented section 6303(b) of the Intelligence Reform and Terrorism Prevention Act of 2004.<sup>4</sup> This Act added a new section 10(k) to the FDI Act (12 U.S.C. 1820(k)), which imposed post-employment restrictions on senior examiners of depository institutions and their holding companies. By its terms, the Act required the Federal banking agencies to consult with each other to ensure that the rules and regulations that they issued were, to the extent possible, consistent and comparable, taking into account any differences in their respective supervisory programs. 12 U.S.C. 1820(k)(4)(B).

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<sup>4</sup> 70 FR 45323 (August 5, 2005).

As a result of that joint rulemaking, the four then-existing federal banking agencies adopted very similar, though not identical, rules that outlined the post-employment restrictions on their senior examiners. For example, the waiver provision for the transferred OTS rules, currently found at 12 CFR 390.4, permits the FDIC's Chairperson, or his designee, on a case-by-case basis, to waive post-employment restrictions. Similarly, the analogous FDIC rule, 12 CFR 303.12, permits the FDIC's Board of Directors to waive the applicability of any regulation, including those governing post-employment restrictions for FDIC's senior examiners, upon a showing of good cause.

After comparing the FDIC's rules with the transferred OTS rule relating to post-employment restrictions for senior examiners, the FDIC has concluded that part 336, subpart C more fully and appropriately implements section 10(k) of the FDIA for the purposes of the FDIC, because it focuses on service as a senior examiner of all insured depository institutions, while the transferred OTS rules found at part 390, subpart A, apply only to senior examiners of savings associations and their holding companies.

Therefore, based on the above, the FDIC proposes to rescind and remove from the Code of Federal Regulations the former OTS rules located at 12 CFR part 390, subpart A. If the proposed rule is adopted, all of the FDIC's senior examiners (including those former OTS examiners who were transferred to the FDIC when the OTS was abolished), regardless of whether they evaluate insured state banks or insured State savings associations, will be subject to the post-employment restrictions currently set forth in 12 CFR part 336, subpart C. Thus, for example, the part 336, subpart C rule will continue to prohibit an FDIC examiner who has served as a senior examiner of an insured institution (whether state bank or state savings association) for at least 2 months during the last 12 months of employment with the

FDIC from knowingly accepting compensation as an employee, officer, director, or consultant from such insured institution or any company that controls that institution. 12 CFR 336.12(a).

In addition, this notice of proposed rulemaking proposes to revise 12 CFR part 336, subpart B by deleting a reference to the “Office of Thrift Supervision” in the definition of “Federal banking agency” described in section 336.3(e) and adding the words “predecessors or” in front of the word “successors”. This proposed revision will help avoid any public confusion by deleting the reference to the former Office of Thrift Supervision while retaining the indirect reference to that former agency by adding a reference to “predecessors” to the definition of “Federal Banking agency”. Further, by including predecessor agencies of the FDIC as Federal banking agencies for purposes of this part, the proposed rule would restrict a potential employee who had been associated with a State savings association from future FDIC employment if the potential employee had been subject to a final enforcement action by the former OTS. *See* 12 CFR 336.4(a)(2) and 336.5(a)(2).

## **II. The Proposal**

Regarding the functions of the former OTS that were transferred to the FDIC, section 316(b)(3) of the Dodd-Frank Act (12 U.S.C. 5414(c)) in pertinent part provides that the former OTS’s regulations will be enforceable by the FDIC until they are modified, terminated, set aside, or superseded in accordance with applicable law. After reviewing the former OTS rules regarding restrictions on post-employment activities of senior examiners currently found in 12 CFR part 390, subpart A, the FDIC, as the appropriate federal banking agency for State savings associations, proposes to rescind these regulations in their entirety. The FDIC believes that the rules found at 12 CFR part 336, subpart C should alone apply to

the post-employment activities of senior examiners who examine either insured State banks or insured State savings associations and that the rules found at 12 CFR part 390, subpart A are essentially duplicative to those found in part 336, subpart C. Rescinding part 390, subpart A will serve to streamline the FDIC's rules and eliminate unnecessary regulations.

The FDIC is also proposing in this notice of proposed rulemaking to revise 12 CFR part 336, Subpart B by deleting a reference to the "Office of Thrift Supervision" in the definition of "Federal banking agency" described in section 336.3(e) and by adding the words "predecessors or" in front of the word "successors". Deletion of the reference to that former federal agency should help eliminate any public confusion. However, adding the reference to "predecessors" in section 336.3(e) provides an indirect reference to the Office of Thrift Supervision if appropriate in the context of subpart B - Minimum Standards of Fitness for Employment With the Federal Deposit Insurance Corporation. With the proposed amendment, even though the OTS no longer exists as Federal banking agency, no person would be permitted to become employed by the FDIC if they had been subject to a final removal or prohibition enforcement order of the former OTS, as a predecessor Federal banking agency to the FDIC.

### **III. Request for Comments**

The FDIC invites comments on all aspects of the proposed rulemaking. In particular, the FDIC requests comments on the following questions:

Are the provisions of 12 CFR part 336, subpart C sufficient to provide consistent post-employment restrictions for the FDIC's senior examiners, regardless of whether the senior examiners evaluated insured state banks or insured State savings associations? Please substantiate your response.



Should part 390, subpart A pertaining to post-employment restrictions for senior examiners be retained in whole or in part? Please substantiate your response.

What negative impacts, if any, can you foresee in the FDIC's proposal to rescind Part 390, Subpart A and remove it from the Code of Federal Regulations and to revise the definition of *Federal banking agency* in section 336.3(e)? Please substantiate your response.

Written comments must be received by the FDIC no later than [insert date 60 days after publication in the Federal Register].

#### **IV. Regulatory Analysis and Procedure**

##### *A. The Paperwork Reduction Act*

The FDIC proposes to rescind and remove from its regulations 12 CFR part 390, subpart A. This rule was transferred with only nominal changes to the FDIC from the OTS when the OTS was abolished by Title III of the Dodd-Frank Act. Part 390, Subpart A is redundant and largely duplicative of the FDIC's rule at part 336 regarding the one-year post-employment restrictions for senior examiners. Removing part 390, subpart A and revising the definition of *Federal banking agency* in section 336.3(e) will not involve any new collections of information pursuant to the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*). Consequently, no information collection has been submitted to the Office of Management and Budget for review.

##### *B. The Regulatory Flexibility Act*

The Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.* (RFA), requires that each federal agency either (1) certify that a proposed rule would not, if adopted in final form, have

a significant economic impact on a substantial number of small entities, or (2) prepare an initial regulatory flexibility analysis of the rule and publish the analysis for comment. Twelve CFR part 336, subpart C was issued as part of an interagency rulemaking designed to implement section 10(k) of the FDI Act, 12 U.S.C. 1820(k). This rule has a limited scope: it imposes post-employment restrictions on certain senior examiners employed by the FDIC and does not impose any obligations or restrictions on banking organizations, including small banking organizations. On this basis, the FDIC certifies that this proposal, if it is adopted in final form, would not have a significant impact on a substantial number of small entities, within the meaning of those terms as used in the RFA. Notwithstanding this certification, the FDIC invites comments on the impact of this rule on small entities.

### *C. Plain Language*

Section 722 of the Gramm-Leach-Bliley Act, Pub. L. 106-102, 113 Stat. 1338, 1471, 12 U.S.C. 4809, requires each Federal banking agency to use plain language in all of its proposed and final rules published after January 1, 2000. As a federal banking agency subject to the provisions of this section, the FDIC has sought to present the proposed rule to rescind part 390, subpart A and to revise the definition at section 336.3(e) in a simple and straightforward manner. The FDIC invites comments on whether the proposal is clearly stated and effectively organized, and how the FDIC might make the proposal easier to understand.

### **List of Subjects in 12 CFR Parts 336 and 390**

Banks, banking; Conflicts of interest; Government employees; Savings associations.

### *Authority and Issuance*

For the reasons stated in the preamble and under the authority of 12 U.S.C. 5412, the Board of Directors of the Federal Deposit Insurance Corporation proposes to amend part 336, subpart B, and part 390, subpart A, of title 12 of the Code of Federal Regulations as follows:

### **PART 336 -- FDIC EMPLOYEES**

1. The authority citation for part 336 continues to read as follows:

AUTHORITY: 61 FR 28728, June 6, 1996, unless otherwise noted.

2. In § 336.3, revise paragraph (e) to read as follows:

**§ 336.3 Definitions.**

\* \* \* \* \*

(e) *Federal Banking agency* means the Office of the Comptroller of the Currency, the Board of Governors of the Federal Reserve System, or the Federal Deposit Insurance Corporation, or their predecessors or successors.

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**PART 390 -- REGULATIONS TRANSFERRED FROM THE OFFICE OF THRIFT SUPERVISION**

3. The authority citation for part 390 is amended by removing the additional authority for subpart A.

AUTHORITY: 12 U.S.C. 1819.

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Subpart A – [Removed and Reserved]

4. Remove and reserve subpart A, consisting of §§ 390.1 through 390.5.

Dated at Washington, D.C., this 28th day of August, 2013.

By order of the Board of Directors.

Federal Deposit Insurance Corporation.

Robert E. Feldman  
Executive Secretary

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